UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

IN THE MATTER OF:	**CASE NO.: 07-CA-132726**

THE DETROIT NEWS, INC., LIMITED PARTNER AND ITS AGENT DETROIT NEWSPAPER PARTNERSHIP, L.P., A LIMITED PARTNERSHIP, A/K/A DETROIT MEDIA PARTNERSHIP

RESPONDENTS,

AND **07-CA-132729**

THE DETROIT FREE PRESS, INC., GENERAL PARTNER AND ITS AGENT DETROIT NEWSPAPER PARTNERSHIP, L.P., A LIMITED PARTNERSHIP, A/K/A DETROIT MEDIA PARTNERSHIP

RESPONDENTS

AND

NEWSPAPER GUILD OF DETROIT, LOCAL 34022 OF THE NEWSPAPER GUILD/CWA, AFL-CIO

CHARGING UNION.

POST-HEARING BRIEF OF RESPONDENTS DETROIT NEWSPAPER PARTNERSHIP, L.P., AND DETROIT FREE PRESS, INC.

Respectfully submitted,

THE ZINSER LAW FIRM, P.C.

L. Michael Zinser
Glenn E. Plosa
414 Union St., Suite 1200
Nashville, Tennessee 37219
Telephone: 615.244.9700
Facsimile: 615.244.9734

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

STATEMENT OF FACTS

I. BACKGROUND

A. THE JOINT OPERATING AGREEMENT

Detroit is a two-newspaper town. Historically, there have existed two publications, the *Detroit Free Press* ("Free Press") and *The Detroit News* ("News"). The two newspapers have been competitors, and are still competitors to this day. (Tr. 85, 304). However, since 1989, with the approval of U.S. Attorney General Edwin Meese, the two newspapers have operated under a Joint Operating Agreement ("JOA") whereby each newspaper maintains its editorial voice through separate, independent, and distinct newsrooms that are separate corporate entities. (J. Ex. 3; Tr. 304).[1] Production and other business aspects of the newspapers are handled by a third company, the Detroit Media Partnership ("DMP"). (*Id*.) Per the terms of the JOA, parking has been at the discretion of, and the responsibility of, DMP. As expressed in the JOA:

> **IV. CONTINUING OPERATIONS**
>
> **(A) General**. On and after the Effective Date, the Partnership shall control, supervise, manage and perform all operations (other that the news and editorial operations) of The Detroit News and the Detroit Pree Press involved in producing, printing, selling, marketing and distributing the Newspapers, including distribution of any content on web sites or web portals; shall determine press runs, press times, page sizes and cutoffs of the Newspapers; shall determine whether supplemental content or products will be distributed (in hard copy or electronic format) in or with one or both Newspapers, including whether and how certain products will be distributed to non-subscribers; shall purchase newsprint, materials and supplies as required; shall solicit and sell advertising space in the Newspapers and any web sites relating to the Newspapers; shall collect the Newspapers' circulation and advertising accounts receivable; ***shall***

[1] Citations to Joint Exhibits shall be designated "J. Ex." Citations to General Counsel Exhibits shall be designated "GC Ex." Citations to Free Press Exhibits shall be designated "DFP Ex." Citations to the transcript shall be designated "Tr." with the corresponding page number.

> ***provide or make available to each Newspaper such parking, subscriptions, messenger services, data process services and photo usage services as the Partnership deems reasonable and appropriate*** (the cost for which shall not be an Editorial Expense); and shall make all determinations and decisions and do any and all acts and things necessarily connected with the foregoing activities, including maintaining insurance coverage that is normal and appropriate for similarly-situated businesses. The Partnership shall be solely responsible for negotiating and administering any agreements with entities which are not affiliated with the General Partner relating to any web sites or web portals which contain all or a portion of the information or advertising in the Newspapers (including contracts to provide supplemenal content such as stock prices and charts, weather and similar non-editorial content), provided that any news and editorial content derived from the Newspapers (other than content obtained from wire services, syndicated columnists and other third parties) which is used on such websites or web portal (i) shall be prepared by the editorial department of the applicable Newspaper and (ii) shall be attributed to the masthead of the applicable Newspaper. The parties recognize that the President or General Manager of the General Partner, who may also be the Publisher of one of the Newspapers, shall have general charge and supervision of the business of the Newspapers, but shall treat each of the Newspapers as separate and distinct editorial functions of the other Newspaper. Expenses of the President or General Manager of the General Partner shall be charged as a Contract Expense under Section IV(K)(iv) below.

(Ex. 4 at 8)(emphasis added). As described, DMP – as an agent of Free Press or News, pursuant to the JOA – is responsible for providing or making available parking. This is a stipulated fact for purposes of this case. (Tr. 597-98).

When the JOA commenced in 1989, Gannett Co., Inc. owned News and Knight Ridder owned Free Press. (Tr. 291-92). In 2005, Gannett purchased Free Press from Knight Ridder; Media News, Inc. purchased News from Gannett. (*Id*.) As of today, Free Press is the General Partner in the JOA, with News designated as the Limited Partner. (J. Ex. 3; Tr. 8, 253).

B. FREE PRESS AND NEWS HAVE SEPARATE BARGAINING RELATIONSHIPS WITH THE GUILD

Free Press and News have had respective collective bargaining relationships with the Newspaper Guild of Detroit ("the Guild") since 1974. (Tr. 249). Collective bargaining negotiations for the individual newspapers have been separate.[2] (Tr. 253). Free Press negotiates hours, wages, and terms and conditions of employment of Guild-represented employees in the news and editorial departments of Free Press; News negotiates hours, wages, and terms and conditions of employment of newsroom and editorial employees of News. Each newspaper memorializes its respective collective bargaining agreement in writing. (J. Exs. 1, 2; Tr. 253-54). The terms of the respective CBAs are unique. (J. Exs. 1, 2). The signatories to the respective CBAs are different, as well. (J. Exs. 1, 2).

The JOA also specifies:

> **(E) Employees.** The Partnership shall determine the staffing levels required for its operations and shall utilize such employees for non-news and non-editorial positions. The Partnership shall have sole and exclusive authority to handle all labor relations matters with respect to all non-news and non-editorial employees of both Newspapers. Subject to applicable collective bargaining agreements, such determinations shall be made by the General Partner …Each Newspaper shall, however, continue to be responsible for the selection, hiring and employment of the employees used in its own news and editorial operations. All labor relations matters with respect to news and editorial employees of the Detroit Free Press and The Detroit News shall be handled by (and shall be within the authority of) the General Partner or the Limited Partner, as the case may be, who from and after the Effective Date shall act in cooperation with the Partnership.

(J. Ex. 3 at 4-5)

[2] Free Press and News engage in joint "Metropolitan Council" "economic negotiations" with all unions at the respective newspapers. (Tr. 106, 342). After meeting in Metro Council negotiations, Free Press and News negotiate separate collective bargaining agreements with the Guild. (Tr. 248-254).

C. PARKING AND THE HISTORICAL, PHYSICAL LOCATIONS OF THE NEWSPAPERS

1. Free Press History

a) Prior to the 1989 JOA

Prior to the JOA formation in November of 1989, Free Press was located at 321 West Lafayette Street in Detroit. (Tr. 789-90). Guild-represented employees at Free Press were responsible for securing their own parking. (Tr. 790). Free Press employees found their own parking wherever they could, at their own expense. (*Id.*)

b) 1989 Parking

After the formation of the JOA in 1989, DMP made parking available per the JOA. (Tr. 790-91). Parking was made available by the JOA; it was not a bargained benefit. (Tr. 795). Free Press employees had the opportunities to park at what was known as the "Times Square" lot, which was made available by DMP. (Tr. 349, 371, 792). No employees, Guild-represented or otherwise, were required to park in the Times Square lot. (Tr. 315, 795). All employees, including Guild-represented employees, who chose to park in the Times Square lot were charged one dollar per day to park in the lot, upon entering. (*Id.*) The cost of parking was not collectively bargained, either. (Tr. 796).

Guild-represented employees were able to park under the same terms and conditions as unrepresented Free Press employees. Historically, Guild-represented employees were offered parking on the same terms as non-represented Free Press employees. (Tr. 492[3], 672, 682, 752-54, 758, 773, 798, 799, 843-44, 847, 873, 920, 925). This is the historical standard.

[3] Grieco testified that although Free Press attorney William Behan, at the July11, 2014 meeting, communicated to him that Guild-represented employees were being treated the

c) 1998 and the Move to 615 West Lafayette

In 1998, Free Press employees moved to 615 West Lafayette Street to be in the same building as DMP and News employees. (Tr. 795). Concurrent with the move to 615 West Lafayette Street, DMP closed the Times Square lot that had offered parking for one dollar per day. (Tr. 795-96). All Free Press employees – Guild-represented and unrepresented – were, now offered by DMP the opportunity to park for $25 per month in one of several surface parking lots, or for $30 a month in a parking garage. (Tr. 795). Consistent with the prior arrangements, parking in the surface lots or the garage was optional; no employee – Guild-represented or otherwise – was required to park in a surface lot or the garage. (Tr. 797). Employees selected whether they wanted to park in the lots, and the cost of parking was deducted from employee paychecks. (Tr. 796). The new parking arrangement represented a change and increase to all employees, both Guild-represented and otherwise. (Tr. 796). Previously, at the Times Square lot, an employee only paid when he or she actually parked in the lot at the time of parking; if an employee was on vacation, out sick, or took time off, the employee did not pay for parking. (Tr. 796). Subsequent to the move to the 615 West Lafayette building, employees who opted for parking at either the surface lot or the parking garage were charged through payroll deduction, regardless of whether the employee actually parked in

---

same as non-Guild-represented employees, per the historical standard regarding parking policies and procedures, he did not seek to verify this fact and claimed that Gallagher and Storeygard did not know. (Tr. 492-93). Gallagher did not support this testimony. Storeygard did not support Grieco's claim, either. (Tr. 752-54). On further testimony, Grieco contradicted himself and admitted that he never investigated whether Guild-represented employees were treated the same as all other employees regarding what they paid for parking. (Tr. 515). Grieco only learned of the historical past practice upon former administrative officer Mleczko's testimony at the hearing. (*Id*.)

either lot. (*Id*.) These changes in parking policies and procedures were not collectively bargained with the Guild. (*Id*.)

Subsequent to moving to the 615 West Lafayette Street address and changing the parking location and costs, the Guild did not make an information request; did not request to bargain with Free Press or DMP; did not file a grievance; and did not file an unfair labor practice charge. (Tr. 796-97).

d) 2004 and the Livonia Bureau

In mid-2004, Free Press shuttered its Livonia/West Wayne bureau. (Tr. 798). Guild-represented and unrepresented employees had worked at the bureau. These employees had historically parked at the bureau, free of charge. (Tr. 798). With the closing of the Livonia/West Wayne bureau, the employees were relocated downtown to the 615 West Lafayette building. (*Id*.) The relocated employees were not offered free parking; rather, the employees were offered parking at the same downtown lots and on the same financial terms as represented and unrepresented employees working downtown. (Tr. 798-99). The Guild did not make an information request; did not request to bargain; did not file a grievance; and did not file an unfair labor practice charge in response to this change. (*Id*.)

e) 2006 and the Riverfront Plant

On February 25, 2006, Free Press shuttered its Riverfront plant. (DFP Ex. 7; Tr. 801). Historically, Guild-represented and unrepresented employees working at the Riverfront plant had parked for free on a surface lot next to the plant. (Tr. 800). In addition, newsroom employees of Free Press could park at the Riverfront plant for free; the Riverfront plant was approximately one-half mile from the 615 West Lafayette

building. (Tr. 800). Free Press had operated a shuttle between the Riverfront plant and the 615 West Lafayette building. (DFP Ex. 7; Tr. 801). With the closing of the Riverfront plant and suspension of the shuttle, Guild-represented employees were relocated to the 615 West Lafayette building. (Tr. 801). The relocated employees – Guild-represented and unrepresented – were offered parking in the same downtown lots and on the same financial terms as all employees at the downtown location. (*Id*.) No employee was required, as a condition of employment, to park at a downtown parking lot – be it owned by DMP or otherwise. In response to this change, the Guild did not make an information request; did not request to bargain; did not file a grievance; and did not file an unfair labor practice charge. (*Id*.)

f) 2009 and the Southfield Bureau

On June 1, 2009, Free Press shuttered its Southfield bureau. (DFP Ex. 8; Tr. 805). Both Guild-represented and unrepresented employees had worked at the bureau. These employees had historically parked at the bureau, free of charge. (Tr. 805). Upon the closure of the bureau, the Southfield bureau employees were relocated to the 615 West Lafayette building. (806). The relocated employees – Guild-represented and unrepresented – were offered parking in the same downtown lots and on the same financial terms and conditions as all other downtown employees. (*Id*.) The relocated employees were not required to park in either lot. (Tr. 806). In response to this change, the Guild did not make an information request; did not request to bargain; did not file a grievance; and did not file an unfair labor practice charge. (*Id*.)

g) 2012 and the Sterling Heights Operation Facility

On March 2, 2012, Guild-represented employees who had been assigned to work at its Sterling Heights operation facility were reassigned to the 615 West Lafayette offices. (DFP Ex. 9; Tr. 807). Historically, Guild-represented and unrepresented employees at the facility had parked next to the facility for free. (*Id*.) The relocated employees were offered parking in the same downtown lots and on the same financial terms as all downtown employees. (Tr. 808-09). In response to this change, the Guild did not make an information request; did not request to bargain; did not file a grievance; and did not file an unfair labor practice charge. (Tr. 809).

h) 2014 and the Closure of the Third and Fort Street Lot

On January 9, 2014, DMP announced the closure of one of the surface lots that had been available to employees, at the corner of Third Street and Fort Street. (DFP Ex. 5). In response, on January 10, 2014, Guild Business Agent Lou Grieco sent an E-Mail to Mark Brown indicating that he (Grieco) had "been inundated with concerns from Free Press and Detroit News employees about this parking situation." (Tr. 572, 791; DFP Ex. 6). Grieco asked why the lot was closing, "[b]ut more importantly, the overwhelming concern is safety, both for the vehicles and the people who will have to park there." (Free Press at 6(a)). At Publisher Paul Anger's request, News Editor Mark Brown sent an E-Mail to Grieco answering questions. (Ex. 6(e)). Brown sent Grieco an E-Mail communication DMP had sent to all DMP, Free Press, and News employees. (Free Press Exs. 5(b), 6(e)). On January 10, 2014, Grieco thanked Brown for sending out the answers

to his questions.[4] (Tr. 579; DFP Ex. 6(h)). In response to the changes, the Guild did not make an information request; did not request to bargain; did not file a grievance; and did not file an unfair labor practice charge. (Tr. 570-571).

2. News History

The 615 West Lafayette facility has historically been known as the Detroit News building. (Tr. 397). The undisputed testimony is that since 1998, all employees at News – both represented by the Guild and otherwise – were treated the same for purposes of parking. (Tr. 492, 672, 682, 752-54, 758, 773, 798, 799, 843, 847, 873, 920, 925). Every employee who availed himself or herself of parking paid for it. (*Id*.) News employees – both Guild-represented and otherwise – also had the ability to park for free at the Riverfront plant, and some people took advantage of that free parking. (Tr. 843-44). News employees were not required to park anywhere; where News employees parked was at the discretion of the employee. (Tr. 844).

At no time between 1998 and 2014 did News bargain with the Guild about parking costs or locations. (Tr. 844). As previously explained, when the Riverfront plant

[4] Incredibly, Grieco claimed, initially, on cross-examination, that he was unaware of the parking lot on Third and Fort Streets, stating "it was possible," and that he was "always" talking about the Lafayette and Third Streets lot. (Tr. 569-70). Only after Grieco was confronted with his own E-Mails concerning the closure of the Third and Fort Streets parking lot, did Grieco acknowledge that he was aware of the Third and Fort Streets parking lot, was aware of its closure, and admitted that the Guild did not file a grievance, did not demand bargaining, and did not file an unfair labor practice charge in response to its closure. (Tr. 570-77). Grieco also did not turn over the E-Mails in response to subpoenas served upon him by DMP and Free Press, claiming that he just did not find the E-Mails. (Tr. 579-81). Grieco's credibility is all the more suspect because despite claiming limited knowledge about the closure of the Third and Fort Street parking lot on January 9, 2014, on direct examination by the General Counsel, Grieco, while describing the Lafayette and Third Streets parking lot and the garage parking lot, ***volunteered***, "…there was also a small lot that I believe got leased out some time early in my tenure, but it had been owned by the Partnership, I think." (Tr. 399). Grieco was hoisted by his own petard; he should not be considered a credible witness.

closed on February 25, 2006 (DFP Ex. 7; Tr. 801), the Guild did not file a grievance, did not demand bargaining, and did not file an unfair labor practice charge. (Tr. 801).

Prior to the move to 160 Fort Street, News individuals that wanted to participate in company-offered parking could park in the Third and Lafayette Street lot at the cost of $25 per month, or the nine-story garage located next to the 615 West Lafayette Street facility at a cost of $30 per month. (Tr. 844).

The historical standard for employees at News, with respect to parking, has been that all employees were treated exactly the same. (Tr. 847-48). Guild-represented employees and all other employees were treated the same for purposes of parking. (*Id*.) It has never been a condition of employment that any News employee park anywhere. (Tr. 315, 855).

D. COLLECTIVE BARGAINING HISTORY

All parties stipulated that the Guild made no written proposals concerning parking in negotiations for the 2010 and/or the 2013 CBAs between the Guild and Free Press and/or the Guild and News. (Tr. 24). At no time did the Guild make a proposal about the cost of parking in 2010 or 2013. (Tr. 304-05, 843).

In negotiations with News, on October 13, 2010, the Guild brought to News's attention concerns about parking lot security, but on November 4, 2010, the Guild withdrew any proposals regarding parking lot security. (Tr. 314-15). At the October 13, 2010 negotiations, News communicated to the Guild that employees did not have to park in company-owned lots. (Tr. 315). The Guild acknowledged and admitted that there was no obligation to park at a company lot. (*Id*.)

In negotiations with Free Press, with the exception of oral proposals concerning security surrounding parking lots, the Guild made no proposals about parking in the 2010 negotiations. (Tr. 870). During the 2010 negotiations, Free Press negotiator William Behan stated, at the bargaining table, that bargaining unit employees were treated the same as non-bargaining unit employees with respect to parking. (Tr. 929). The Guild made no proposals at all concerning parking in the 2012 to 2013 negotiations, which culminated in the current, 2013 CBA. (*Id)*. Guild Representative Louis Mleczko confirmed these facts and admitted that the Guild, at no time, made a proposal that Free Press reimburse employees for the cost of parking. (Tr. 321-22). He acknowledged the same fact with respect to negotiations with News. (Tr. 322).

Mleczko retired as Guild Administrative Officer on August 1, 2013. Lou Grieco, who succeeded Mleczko as Administrative Officer, testified that until he heard Mleczko's testimony in this case, on February 2 and 3, 2015, he (Grieco) was unaware of the historical costs of parking and was unaware that DMP had historically, unilaterally, changed the cost of parking. (Tr. 585). Grieco further testified that he did not go through every Guild-maintained file to understand the background of parking policies and procedures, instead, Grieco "relied on [Mleczko] a good deal," in an attempt to understand the history of parking. (Tr. 583-84). After attempting to inflate his knowledge of the history of parking and bargaining about "parking," Grieco conceded that, to his knowledge, the Guild only had a file on "theft problems in the lots," and there were no Guild records indicating that the cost of parking had ever been mentioned or discussed. (Tr. 573-74).

E. THE MOVE TO 160 FORT STREET; GUILD INFORMATION REQUESTS; SETTING UP BARGAINING

In April of 2014, the Guild "became aware" of a potential move of Free Press and News to a new facility. (Tr. 397). The move was to a new facility at 160 Fort Street in Detroit. (Tr. 397).

On or about June 10, 2014, Guild Administrative Office Grieco E-Mailed Free Press and News stating, in relevant part:

> As you can probably imagine, our members are quite concerned about parking after the move, which is only three months away. Of course, the Guild has the right to bargain the effects of the move, which would include any change in parking arrangements or costs.

(J. Ex. 4). Included in the letter was a seven-point information request.

The next day, on June 11, 2014, Jeffrey Lefebvre, of DMP sent an E-Mail to Grieco, stating, in relevant part:

> It was nice chatting with you today and I appreciate you sharing a bit about your background. I look forward to working with you as we move forward.
>
> Per our discussion, we are not prepared to answer these questions at this time, but will let you know once we are prepared
>
> Please contact me if you have any other questions.

On June 14, 2014, Mark Brown, of DMP, sent an announcement to all "Downtown employees" entitled "Parking information." (J. Ex. 7). The announcement explained the locations of two garages in which DMP, as agent of Free Press and News, had secured spaces, information about security escorts for walking to and from the lots, selection options for employees interested in availing themselves of the offered parking, and the cost of parking. (*Id*.)

1. The June 16, 2014 Announcement

On June 16, 2014, Joyce Jenereaux, President of DMP, sent an announcement to all employees at DMP, Free Press, and News entitled "Parking Announcement." (J. Ex. 6). The announcement explained DMP, as agent of Free Press and News, had reserved spaces in two parking garages near the 160 Fort Street facility. The announcement explained that the company "will be absorbing some of the costs of parking" and that the rates will depend upon the selected garage and income. (*Id* at 2). The announcement also explained, "You are under no obligation to rent a parking space through the company. You are free to make your own arrangements that better suit your needs." (*Id* at 2). The announcement included alternatives to renting a company-administered parking spot, including public transportation, vanpools, carpools, parking in other lots, taking Detroit's People Mover, as well as other options. (*Id*.) The communication announced Monday, July 7, 2014, as the date to sign up for a parking option.

The letter explained:

> Your parking selection will remain in effect for one year from the date of our move. At that point, you may request a change in your parking arrangement or opt out of company-provided parking options.
>
> **Parking prices:**
>
> ***If you are assigned a space in the First Street Garage--***
>
> ***Monthly***

Compensation Range	**Employee Pays**	**Company Pays**	**Cost of Space**
Up to 55,000	$60	$70	$130
55,001 75,000	$80	$50	$130
75,001 100,000	$90	$40	$130
100,001 and over	$130	$0	$130

If you are assigned a space in the Financial District Garage--

Compensation Range	Employee Pays	Company Pays	Cost of Space
Up to 55,000	$105	$70	$175
55,001 75,000	$125	$50	$175
75,001 100,000	$135	$40	$175
100,001 and over	$175	$0	$175

As with the current parking arrangement, the company will deduct your parking costs from your check in pre-tax dollars, which will save most people money on their federal income taxes. No refunds will be provided for days in which you are out of the office for any reason.

(*Id*.) The letter closed with:

I know this will add to your expense at a time in which many are already feeling financially strained. But after many years in which the company has provided company-owned parking facilities at a small fraction of the going rate, we're now facing the same issues that impact most everyone who works downtown.

(*Id*.)

2. Grieco's June 16, 2014 E-Mail and Subsequent Communications

On June 16, 2014, Grieco, via E-Mail to Jeffrey Lefebvre wrote, in relevant part:

Last week I sent an e-mail involving the Guild's right to bargain concerning changes in parking arrangements or costs and, to start, I requested information that would relate to such bargaining. I was told that no information was available, but would become available very soon. Looks like the information has become available, though the company did not send it to me. Our members, with whom you are directly dealing, have sent it on to me. Direct dealing, of course, improper. [*sic*] We are not conceding that the company may unilaterally determine parking terms and procedures for bargaining unit employees and we expect bargaining to occur before any future changes. So I am hereby requesting bargaining concerning the parking policy issued to our members today.

Beside the cost issues [sic] I can tell you that we are already hearing from unit members regarding other concerns related to the policy *e.g.*, should those with disabilities be given priority for parking in the closer garage and, if so, will they be forced to pay the higher rates? The same concern exists for photographers who have to carry equipment for work.

> Please let me know your availability for bargaining, including some dates that would work for you.

(GC Ex. 29). The next day, June 17, 2014, Lefebvre wrote Grieco, stating that he was out of the office and would connect with Grieco to chat, offering Grieco his cell phone number to contact him. (J. Ex. 9).

Through a series of E-Mails between June 20 and 26, 2014, Mr. Grieco and Mr. Lefebvre were able to agree to meet on July 11, 2014 at 10:00 a.m. at the 615 West Lafayette Street building. (J. Exs. 10-13, 15-19).

On June 23, 2014, on behalf of Mark Brown, DMP sent an E-Mail to all DMP employees, all Free Press employees, and News employees regarding alternatives to paying for parking upon the move to the 160 Fort Street address. (J. Ex. 14). The E-Mail announced an information session for employees scheduled for June 27, 2014 from 2:00 p.m. to 5:00 p.m.

On June 27, 2014, Grieco E-Mailed Lefebvre, stating, in relevant part:

> In anticipation of our upcoming effects bargaining, I will need answers to the following:
>
> Are these garages open 24 hours day? On weekends?
>
> Do they have security and attendants all the time?
>
> Are pro-rated rates available for those who don't plan to be in the office every day/work from home or elsewhere part of the week?

(J. Ex. 20).

On June 27, 2014, Joyce Jenereaux, in an E-Mail to all DMP employees, all Free Press employees, and all News employees, confirmed the sale of the downtown building located at 615 West Lafayette. (J. Ex. 21).

3. The Guild Requests that the Deadline to Sign up for Parking Be Postponed, and DMP Agrees.

On June 30, 2014, via E-Mail, Grieco requested that the July 7 deadline announced in Ms. Jenereaux's June 16, 2014 E-Mail regarding the selection of parking be postponed to:

> … give us the opportunity to bargain the issues and perhaps resolve any issues that might affect the employees' decisions. If you will not at least postpone the deadline, we request that the policy and procedure announced in Ms. Jenereaux's E-Mail be rescinded and the status quo be restored. We are concerned that bargaining after policy is decided and announced to employees will not be meaningful, and the Company will simply go through the motions but make no agreements, precisely because the policy has already been unilaterally determined and announced.

(J. Ex. 22).

On June 30, 2014, Lefebvre, in an E-Mail to Grieco, stated that he would "work on getting the answers to your questions below," in response to Grieco's June 27, 2014 E-Mail questions. Lefebvre's same June 30, 2014 E-Mail asked Grieco to confirm his availability for July 11, 2014 at 10:00 a.m. (J. Ex. 23). Later that day, Grieco confirmed, "We will be there on July 11 at 10 a.m." (J. Ex. 24).

On July 1, 2014, Lefebvre sent an E-Mail to Grieco explaining, in relevant part:

> As you know, this [parking] policy effects [*sic*] all employee, [*sic*] not just the bargaining unit. That being said, we do recognize your request to postpone the July 7 deadline until such time as we are able to meet. We will be sending out a communication shortly addressing a number of questions that have been asked, and included in these will be the extended deadline date.
>
> I will forward to you as soon as it is sent.

(J. Ex. 25).

On July 2, 2014, Joyce Jenereaux, via E-Mail to all DMP employees, all Free Press employees, and all News employees, sent an "FAQ" regarding questions about the

new building and the move, including parking. (J. Ex. 26). Included was a postponement of the deadline to sign up for parking, postponing the date to July 21, 2014. (*Id*.) The FAQ also answered questions about transportation to and from the First Street garage, security and escorts, charging spaces for electric cars, handicap parking, and other questions. (*Id*.)

Eleven minutes later, on July 2, 2014, Lefebvre forwarded to Grieco Ms. Jenereaux's E-Mail, consistent with his July 1, 2014 E-Mail representation. (J. Ex. 28).

Approximately fifteen minutes later, on July 2, 2014, Lefebvre sent Grieco another E-Mail (J. Ex. 29) answering the three questions from Grieco's June 27, 2014 E-Mail (J. Ex. 21). Lefebvre explained that the garages were open twenty-four hours a day and on weekends for monthly parkers; one lot had an attendant until 10 p.m., while the other had an attendant until 11 p.m.; and "anyone who feels they won't use monthly parking enough to make it worthwhile is free to make their own private arrangements." (J. Ex. 29).

Later, on July 2, 2014, on behalf of Mark Brown, DMP sent an E-Mail to all DMP employees, all Free Press employees, and all News employees with additional downtown parking information. (J. Ex. 27).

Seven minutes later, on July 2, 2014, Lefebvre forwarded the communication to Grieco. (J. Ex. 30).

On July 7, 2014, on behalf of Mark Brown, DMP sent an E-Mail to all DMP employees, all Free Press employees, and all News employees attaching a form for selecting parking preferences, if the employee wanted to avail him or herself of the parking to be offered at the 160 Fort Street address. (J. Ex. 31). The E-Mail also included

the information that had previously been made available in Brown's July 2, 2014 communication. (*Id*.)

F. THE JULY 11, 2014 BARGAINING MEETING

On July 11, 2014, at the Guild's request, Free Press and News met to discuss parking and concerns the Guild had about it. Present for the Guild were Lou Grieco, John Gallagher (Guild President and Unit Chair of Free Press), Kim Storeygard (Guild Treasurer and Unit Chair of News), attorney Robert Vercruysse on behalf of News, Senior Vice-President of Labor Relations for Gannett William Behan on behalf of Free Press, and Jeffrey Lefebvre. (Tr. 414-15, 661-62, 727, 871). The meeting occurred at a conference room at the 615 West Lafayette facility. (*Id*.) The meeting started, substantively, with Grieco stating that the Guild wanted to meet because Guild-represented employees were upset about the anticipated changes in parking associated with the move to 160 Fort Street. (Tr. 871). Grieco further explained that employees were upset about the increase in cost of parking, and that the Guild had concerns about safety and security regarding the parking facilities. (Tr. 871-72).

Grieco presented a document entitled, "Guild Proposal for Parking for Both the Detroit Free Press and Detroit News Bargaining Units." (J. Ex. 34; Tr. 491, 663, 728, 878). The document stated:

> This proposal would ***amend the current contracts*** and be in force until new contracts are bargained.
>
> 1. There will be no charge for those employees who need to leave the building for assignments, particularly but not limited to reporters and photographers.
>
> 2. Those same employees will be assigned spots in the closer parking lot.

3. For remaining employees, the cost will not go above the $25 they are currently paying.

4. Those with medical conditions/disabilities should be allowed to park in the closer lot.

5. The Company shall keep the current company cars – two for the Free Press and two for the News. These can be used for breaking news assignments should staffers choose to use them, or have to use them in the event their own vehicle is not available.

6. Those who work nightshift shall be allowed to move their cars to the closer lot after 6 p.m. at no extra charge; or will be allowed to park in the closer lot at the minimal charge.

(J. Ex. 34) (emphasis added). Grieco elaborated on point #4 regarding individuals with disabilities. (Tr. 879).

At the meeting, News generally permitted Free Press to speak first and then followed and affirmed Free Press's position. (Tr. 907). Behan, on behalf of Free Press, stated that "the subject of the change in parking arrangements was not a subject over which [Free Press] had an obligation to bargain." (Tr. 872). The rationale was that the contract was in effect and it had no provision relating to parking arrangements; Guild-represented employees were offered parking opportunities, including location, price, and availability on the same terms as non-bargaining unit employees, which was the historical standard in past practice; and as the relationship between the parties concerning parking was not changing and was continuing on the same basis as non-represented employees, there was nothing to bargain. (Tr. 872-73). Behan staked out a legal position that changes to parking were not subject to bargaining but then agreed to discuss, with the Guild, concerns about parking and related issues. (Tr. 874). Behan candidly testified, "It's something I do quite frequently in negotiations." (*Id*.)

Grieco also presented two charts, the first entitled, "The Effect on the Contractual Raises" (J. Ex. 32), the second entitled, "Change in Cost to Employees" (J. Ex. 33). Each chart purported to be a comparison of the financial impact of parking on Guild-represented employees. Mr. Behan accepted the documents but had no questions about them. (Tr. 875).

Item #1 of the Guild's Proposal represented a significant change to the status quo for a number of employees, changing the cost of parking from either twenty-five or thirty-dollars per month to parking for free. (Tr. 688-89, 751-52, 825, 879). Here it is important to note that that subsequent to the move to the 160 Fort Street address, there are no company-owned lots and Free Press and News are, for the first time, subsidizing employee parking. (J. Ex. 7). Free Press and News were maintaining the status quo in that optional parking is being offered to Guild-represented employees on the same terms as it is being offered to all other Free Press and News employees, respectively, but the Guild sought a wholesale redefinition of the relationship between the parties over parking.

Item #2 represented a change to the status quo for parking as, again, certain employees would not be charged for parking and would park for free. (*Id*.). In response to Items #1 and #2, Behan told Grieco, at the table, that Items #1 and #2 were items to which the companies were not prepared to agree. (Tr. 879-80).

The companies rejected Item #3.

With respect to Item #4, the parties discussed the Guild's proposal. Behan stated that it was the companies' "intention to afford individuals with disabilities the ability to park in the Financial District garage, which is the closer garage but also the more

expensive garage, to allow them to park in the Financial District garage at the … further garage, at the First Street rates. So park closer at the cheaper rates." (Tr. 880).

With respect to Item #5, the companies rejected the proposal. (Tr. 881). Automobiles were already bargained in the Free Press CBA. (J. Ex. 1 at 5). The Guild's proposal sought to modify the CBA.

With respect to Item #6, Behan explained that the companies did not own the garage, only that they were securing certain numbers of spaces in garages. (Tr. 881). As a result, the companies did not have the ability to agree to people switching garages, and the proposal was rejected. (Tr. 881).

Grieco voiced a concern regarding safety and security of Guild-represented employees coming and going from the new parking lots, particularly employees who worked in the evening and night. (Tr. 875). Behan concurred with Grieco's concerns about safety and security of employees and explained that the companies "anticipated having a van shuttle from the office building to the further of the parking lots. Also, that there would be security escorts for people, to walk people to the parking lots." (*Id*.) Grieco inquired about who was to provide security escorts; Behan explained that it was the companies' "understanding that the security escorts were going to be provided by whatever firm the landlord for the new building engaged to provide building security." (Tr. 876). In further response to the Guild's concerns about whether security would be effective, Behan stated that if changes needed to be made or improvements could be made, the companies wanted to know so that the issues could be addressed because there was a shared concern for employee security. (*Id*

The Guild also raised the issue of photographers, specifically the concern that photographers carried expensive camera gear that was also heavy. (Tr. 877-78). Grieco expressed concern about photographers being able to get in and out of the new building relatively easily whole carrying expensive gear. (Tr. 878).

The Guild, thereafter, called a caucus and the Guild bargaining committee kept the room. (Tr. 881). Approximately ten to fifteen minutes later, Unit Chair Gallagher called the companies' bargaining committee and informed them, "The Union was done, they had nothing further, and they were intending to leave." (Tr. 882). The companies' bargaining committee asked to reconvene, which the parties did. (Tr. 882-83). Upon reconvening, Behan explained that in light of the Guild having nothing further and intending to leave, he wanted to make it clear that the implementation of parking was going forward and that the company needed to continue the process of determining which employees wished to take advantage of parking. (Tr. 883). Mr. Vercruysse stated that it should be clear that if an employee did not return a parking selection form by the deadline of July 21, 2014, the company would consider it to be an opt-out and the employee would risk losing the opportunity for parking. (Tr. 883-84). Grieco responded that the Guild understood. (Tr. 535, 591-92, 884).

The Guild did not propose setting up additional meeting dates and has never requested additional meeting dates with Free Press. (Tr. 535, 591-92, 884).

The July 11 meeting resulted in Free Press changing its position in response to the Union's proposal regarding Item #4. (Tr. 895). Free Press agreed to the Guild's proposal to park in the Financial District lot at the price of the First Street lot. (Tr. 895). Free Press

also warranted that the fleet cars[5] would be examined and maintained in good condition. (Tr. 755, 761). At the conclusion of the meeting, it was the Guild that had nothing further and was the party that ended the negotiations; neither Behan nor Vercruysse said words to the effect, or in any way indicated to the Guild, that the company would refuse to bargain with the Guild further regarding the effects of the parking policy. (Tr. 908).

Thereafter, all employees, both represented and unrepresented employees, either opted in or opted out of parking. (DFP Exs. 13, 14). A total of 73 Guild-represented employees at Free Press opted in to parking. (DFP Ex. 13). A total of 38 Guild-represented Free Press employees opted out of parking. (DFP Ex. 14). A total of 64 News Guild-represented employees opted in to parking. (DFP Ex. 13). A total of 26 Guild-represented News employees opted out of parking. (DFP Ex. 14).

G. THE GUILD COMMUNICATES TO ITS MEMBERS ABOUT BARGAINING

On July 14, 2014, Grieco sent a letter to bargaining unit employees at Free Press and News. The letter stated:

> To members of the Free Press and Detroit News bargaining units:
>
> I know that you are hungry for information concerning the parking situation. I am writing to tell you that today we filed unfair labor practice charges with the National Labor Relations Board against the Detroit News and Detroit Free Press, given the two companies' refusal to bargain about parking issues.
>
> On Friday, July 11, the Guild met with representatives of the Free Press, the News, and Detroit Media Partnership to bargain over the changes concerning employee parking. On our side was myself, Free Press Unit Chair John Gallagher and News Unit Chair Kim Storeygard. No one from the newsroom management was present. Instead, the lawyers showed up.

[5] The number of fleet cars has, historically, been unilaterally changed by DMP. (DFP Ex. 12; Tr. 815-16). The Guild has never filed a grievance, demanded bargaining, or filed an unfair labor practice charge over the unilateral changes to the number of fleet cars. (Tr. 816-17).

Gannett flew in Senior Vice President/Labor Relations William A. Behan, who is based in McLean, Virginia. Robert M. Vercruysse, who is based in Bingham Farms, represented the News. The third member of the party was Jeff Lefebvre, the Regional HR Director.

When I asked whether the parking plan issued last month should be considered their opening proposal, they said no, because they did not believe they have any obligation to bargain over employee parking charges and changes. The main reason they cited was that parking is not mentioned in the Free Press or News collective bargaining agreement.

This is true, but it does not tell the whole story. A change in past practice – and there is a long past practice of providing a parking benefit – is also a change in working conditions and is thus subject to bargaining, we believe. The Union also has the right to demand bargaining over the "effects" to the employees of a legitimate management decision, such as the decision to change the location of the office. This remains the Guild's position.

During the meeting, the Guild reps also outlined several concerns about the new parking arrangements, including where people with disabilities will be able to park and at what cost; the impact on photographers who have to carry equipment; the safety of late-night workers; the impact on reporters covering breaking news who have to park, leave and return to parking facilities blocks away from the newsroom; and of course the impact of the dramatic increase in cost, which wipes out the 1% raises we got in our current contracts.

In my June 16 e-mail to management, I asked, among other things, "Beside the cost issues, I can tell you that we are already hearing from unit members regarding other concerns related to the policy, *e.g.*, should those with disabilities be given priority for parking in the closer garage and, if so, will they be forced to pay the higher rates?" At our Friday meeting, the companies made one concession, saying that anyone with a valid handicapped parking tag will be given priority for the closer garage but will only be charged at the lower rate of the more distant garage.

So the Company adopted one common sense piece of fairness. But that's as far as they're willing to go for. Instead, the Company plans to unilaterally implement its new parking policy.

So we'll go to the NLRB with this.

As for your choices: It is our recommendation that, if you plan to use one of the two garages, file your preference before the July 21 deadline. Your signing up for this parking benefit will not undercut our legal case.

> One last thing: a member of the management legal team that the parking benefit has been offered "gratuitously" to employees. That's lawyer-speak for a type of benefit that you have no right to expect and there's no obligation to bargain about. The classic example is a Christmas turkey. Seriously.

(J. Ex. 35).

Grieco, in the second paragraph of his communication, explained that the meeting was "to bargain over the changes concerning employee parking." Grieco further acknowledged that the decision to offer parking was a management decision not subject to bargaining – only the effects of that decision were potentially subject to bargaining.

Significantly, in the sixth full paragraph, Grieco communicated, "At our Friday meeting, ***the companies made one concession***, saying that anyone with a valid handicapped parking tag will be given priority for the closer garage but will only be charged at the lower rate of the more distant garage." (J. Ex. 35) (emphasis added).

H. ADDITIONAL OPTIONAL SERVICES HAVE HISTORICALLY BEEN UNILATERALLY CHANGED.

In addition to the convenience of parking, Free Press and News employees were able to take advantage of a hot food cafeteria at the 615 West Lafayette facility operated and provided by DMP. (Tr. 809). Through an offer of proof, Free Press explained that from 1998 to 2012 there was a hot food cafeteria that was available to employees; on April 23, 2012, DMP sent out a memorandum announcing that the cafeteria would close and that when it reopened, it would no longer be a hot food cafeteria, rather, it would be a 24/7 self-service operation; and which, in fact, occurred in May of 2012. (DFP Ex. 10 (rejected); Tr. 810-11). Free Press further made an offer of proof that the Guild did not request bargaining over the change, did not file a grievance over the change, and did not

file an unfair labor practice over the change. (Tr. 811). Further, upon moving to the 160 Fort Street address, there is no comparable food service provided, about which the Guild has not grieved, has not filed an unfair labor practice charge, and about which the Guild has not requested bargaining. (Tr. 811-12).

Through a second offer of proof, Free Press offered evidence that at the 615 West Lafayette facility, there was an exercise and fitness center employees were permitted to use, free of charge. (Tr. 812). Free Press closed the facility on July 23, 2014. (DFP Ex. 11 (rejected); Tr. 812). Upon the closure of the fitness center, the Guild did not file a grievance, did not demand bargaining, and did not file an unfair labor practice charge. (Tr. 812-13). Upon moving to the 160 Fort Street facility, there is no exercise facility provided to employees free of charge. The Guild has not filed a grievance, has not requested bargaining, and has not filed an unfair labor practice charge about this change. (Tr. 812-13).

Since 1998, DMP has made available cars for employee use by Free Press and News. (Tr. 814). Over the years, the number of available cars has been unilaterally reduced. (Tr. 814). The Guild has not requested bargaining over the decreases, has not filed a grievance over the decreases, and has not filed an unfair labor practice charge over the decreases. (DFP Ex. 12; Tr. 814-15).

II. PROCEDURAL HISTORY OF THE CASE

On July 14, 2014, the Guild filed Unfair Labor Practice Charge 7-CA-132726 and 7-CA-132729. (GC Exs. 1(a) and 1(d)). The changes were amended on September 9, 2014. (GC Exs. 1(g) and 1(j)). On October 31, 2014, the Regional Director issued a complaint. (GC Ex. 1(o)). On February 2 through 5, 2014, at a hearing at the NLRB's regional office in Detroit, before Administrative Law Judge Susan Flynn, the General Counsel, Charging Party, Detroit Media Partnership, Free Press, and Detroit News presented evidence and created a record on which the preceding Statement of Facts, and the foregoing argument, is based.

STATEMENT OF ISSUES PRESENTED

1. Is parking a mandatory subject of bargaining? [No]

2. Assuming Free Press had a bargaining obligation, did Free Press fail and refuse to bargain collectively about parking, parking policies, and procedures, including locations and costs? [No]

3. Should the allegations in the Complaint be dismissed due to the rich past practice of changes to parking policies and procedures, and having parking policies and procedures apply to bargaining unit employees on the same basis as non-bargaining unit employees? [Yes]

4. Has Free Press maintained the status quo regarding parking policies and procedures since moving to the 160 Fort Street address? [Yes]

5. Did the Guild waive any right to bargain about parking and parking policies and procedures? [Yes]

6. Did DMP, as an agent for Free Press and News, engage in direct dealing through a June 16, 2014 and July 2, 2014 E-Mail from Joyce Jenereaux, attaching a frequently asked questions memorandum? [No]

ARGUMENT

I. PARKING WAS NOT A MANDATORY SUBJECT OF BARGAINING.

Parking in this situation was not a wage, hour, or term and condition of employment. As a result, parking is not a mandatory subject of bargaining. The seminal case of *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958) explained that Section 8(a)(5), in conjunction with Section 8(d) of the Act, "established the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment' … As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." As such, there is no obligation to bargain about a non-mandatory subject of bargaining.

Further, the Court in *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185, 95 S.Ct. 383, 30 L.Ed.2d 341 (1971) opined that to the extent a company modifies a non-mandatory subject of bargaining during the term of a contract, such a change is permissible. The Court explained, "Section 8(d) embraces only mandatory subjects of bargaining … accordingly just as Section 8(d) defines the obligation to bargain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement." *Id* at 185-86, 92 S.Ct. 383, 30 L.Ed.2d 341.

Allied Chemical & Alkali Workers further explained that even if a matter had been an issue of bargaining, that fact, in and of itself, does not make the issue a mandatory

subject of bargaining pursuant to the Act. *Id* at 176. The Court explained, in the context of retiree benefits:

> But even if industry [practice] commonly regards retirees' benefits as a statutory subject of bargaining, that would at most, as we suggested in *Fibreboard Paper Products Corp v. NLRB*, 379 U.S. 203, 211, 85 S.Ct. 398, 403, 13 L.Ed.2d 233 (1964), reflect the interests of employers and employees in the subject matter as well as its amenability to the collective bargaining process; it would not be determinative. Common practice cannot change the law and make into bargaining unit "employees" those who are not.

In the same way, simply negotiating over an aspect of parking cannot alter the fact that it has always been an optional convenience offered by Free Press and News to employees. No employee has ever been required to park at any particular lot in order to work at Free Press or News. Similarly, that parking policies and procedures are amenable to the collective bargaining process does not make parking a mandatory subject of bargaining. That Free Press and News offered parking at a reduced rate was certainly a convenience, but it is undisputed that no employee was required to park at a company-affiliated parking lot as a condition of employment. (Tr. 315, 768-69).

The General Counsel errs in focusing on the difference in costs associated with parking subsequent to the 160 Fort Street address move. This is an understandable, but ultimately irrelevant, argument. The magnitude of the change in parking costs is irrelevant to the consideration. If there is no legal obligation to bargain, then no such obligation is created merely by the size of the change at issue.

The General Counsel's theory further discounts the fact that subsequent to the move to the 160 Fort Street address, there are no company-owned lots. Subsequent to the move, Free Press and News are, for the first time, subsidizing employee parking. (J. Ex. 7). Free Press and News are maintaining the status quo in that optional parking is being

offered to Guild-represented employees on the same terms as it is being offered to all other Free Press and News employees, respectively.

DMP, as agent to Free Press and News, was permitted to make changes to parking, without an obligation to bargain. *First National Maintenance Corp. v. NLRB* made it clear that when an employer decides to close a facility for legitimate reasons, there is no obligation to bargain over the decision. *See* 452 U.S. 681-82, 686, 101 S.Ct. 2573, 69 L.Ed. 318 (1981). *First Nat'l Maint.* evaluated plant closure as a mandatory versus non-mandatory subject of bargaining and determined it to be a non-mandatory subject. *See* 452 U.S. at 685, 101 S.Ct. 2573, 69 L.Ed.2d 318. As is relevant to the instant case, the Court realized the problem of finding plant closure a mandatory subject of bargaining:

> If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in "surface bargaining," a violation of its good faith. (internal citation omitted.) A union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try and alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board. (Internal citations omitted.) We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of § 8(d)'s "terms and conditions," see n. 12, *supra*, over which Congress has mandated bargaining.

452 U.S. at 685-86, 101 S.Ct. 2573, 69 L.Ed.2d 318 (footnotes omitted). Thus, the decision to sell the 615 West Lafayette building and parking lots was not a mandatory subject of bargaining.

Further, *Mental Health Services, Northwest*, 300 NLRB 926, 928 (1990), explained that an issue is a mandatory subject of bargaining "if it is one that will 'settle

an aspect of the relationship between the employer and the employees.' As the First Circuit has stated, 'This means that the subject must bear a 'direct, significant relationship to terms or conditions of employment,' rather than a 'remote or incidental relationship'." 300 NLRB at 927 (quoting *Allied Chemical Workers*, 404 U.S. at 178 and *NLRB v. Salvation Army Day Care Center*, 763 F.2d 1, 7 (1st Cir. 1985)(in turn quoting *NLRB v. Mass. Nurses Assn.*, 557 F.2d 894, 898 (1st Cir. 1977)))(internal ellipses omitted). At most, parking at Free Press and News, as the record reflects, has an incidental relationship to employment at Free Press and News. Parking cannot, therefore be a mandatory subject of bargaining, particularly when it is not required, and is optional.

II. DMP AND FREE PRESS ENGAGED IN EFFECTS BARGAINING.

While management decisions are not subject to bargaining, in some instances, at the request of a union, there can exist a duty to bargain about the effects of the decision. *See First Nat'l Maint.*, 452 U.S. at 685-86, 101 S.Ct. 2573, 69 L.Ed.2d 318. This is traditionally referred to as "effects bargaining." The record reflects that Free Press and News bargained with the Guild about the effects of the closure of the parking lots associated with the 615 West Lafayette building.

The General Counsel referenced *United Parcel Service*, 336 NLRB 1134 (2001) for the proposition that a ***change*** in an employer's parking policy constituted a mandatory subject of bargaining. (Tr. 72). This materially misrepresents *United Parcel Service*. In *United Parcel Service*, the Board specifically stated that, "Respondent is obligated to bargain over the ***effects*** of the parking lot relocation, and that the Respondent violated the Act by failing to discuss the ***effects*** of the parking lot relocation after the Union made a bargaining request." *Id* at 1135 (emphasis added). In contrast with *United*

Parcel Service, Free Press met and bargained with the Guild about the effects of the new parking procedures and policies, at the Guild's request.

The Guild, through Grieco, made it clear that the Guild sought to "bargain the effects of the move, which would include any change in parking arrangements or costs." (J. Ex. 4, 8, 20, 22; GC Ex. 29). Grieco consistently referred to "effects bargaining" or the "effects" of the move to 160 Fort Street prior to meeting on July 11, 2014. (*Id*.).

Parking has never been required as part of a bargaining unit employee's or unrepresented employee's job at either Free Press or News. (Tr. 315, 768-69). This was the case before the move to 160 Fort Street. Concurrent with the move to the 160 Fort Street building, DMP negotiated rates for parking at specific lots of which employees could take advantage, at their option. In contrast with the parking lots associated with the 615 West Lafayette facility, DMP no longer owns parking lots. However, as before the move, parking is optional.

In advance of the July 11, 2014 bargaining meeting, DMP, on behalf of Free Press and News, provided all of the information requested by the Guild. (Tr. 901). Free Press arranged to meet with the Guild at a mutually agreeable time and place. The Guild was unavailable at an originally proposed date due to the absence of the Union president who was on vacation at the time. (Tr. 479-80).

At the July 11, 2014 meeting, the Guild presented a proposal styling the document "Guild Proposal for Parking." (J. Ex. 34). The preamble of the proposal stated:

> This proposal ***would amend the current contracts*** and be in force until new contracts are bargained.

Id. (emphasis added). In spite of the five previous, written, representations by the Guild that it desired to bargain over the effects of the closure of the parking lots (J. Exs. 4, 8,

20, 22; G.C. Ex. 29; Tr. 631), the Guild proposal, on its face, sought to engage in ***mid-term bargaining***, whereby the CBAs with Free Press and News would be modified. At no time has the Guild deviated from this position.

It is beyond cavil that, absent a reopener provision covering the matter proposed, under Section 8(d) of the Act, the other party is under no obligation to consent to a modification of a contract or to even discuss the matter. *See Smurfit-Stone Container Enterprises*, 357 NLRB No. 144 at *2 (2011) (citing *Boeing Co.*, 337 NLRB 758, 762-63 (2002), and cases cited there). It is similarly undisputed that a mid-term modification is a non-mandatory subject of bargaining. *Id.* (citing *New Seasons, Inc.*, 346 NLRB 610, 617-18 (2006); *Chesapeake Plywood*, 294 NLRB 201, 211-12 (1989), enfd. mem. 917 F.2d 22 (4th Cir. 1990)). *Smurfit-Stone* further explained that an employer violates Section 8(a)(5) of the Act "to insist on a union's consent to a non-mandatory proposal as a condition of reaching agreement on mandatory bargaining subjects." *Id.* (citing *Borg-Warner Corp v. NLRB*, 356 U.S. 342, 347-49, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958)).[6] Significantly, *Smurfit-Stone* rejected the idea that early contract termination along with either severance pay or extended medical benefits, or both, converted the company's early contract termination proposal into a mandatory subject of bargaining under any Board precedent. (357 NLRB No. 144 at *4). This same rationale applies to the instant case: the Guild's proposal for mid-term contract modifications when neither the Free Press nor News contract has any provision relating to parking presented a permissive subject of bargaining. The Respondents cannot be found to have violated Section 8(a) (5)

[6] "Since Section 8(b)(3) parallels Section 8(a)(5) of the Act, it hardly need be said that the obligations imposed on employers, as reflected and interpreted in [8(a)(5)] cases, are likewise applicable to labor organizations." *Local Union 612, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 215 NLRB 789, 791 (1974).

by refusing to bargain over a permissive subject of bargaining. Assuming *arguendo* that parking is a mandatory subject of bargaining, the Guild's coupling of effects bargaining with mid-term contract modification, as a condition of an overall agreement, is bad faith bargaining on the part of the Guild that serves as a complete defense to an allegation that Free Press or News refused to bargain.

Bad faith bargaining on the part of a union can "effectively excuse the [company's] obligation to bargain." *See Bridon Cordage, Inc.*, 329 NLRB 258, 259 (citing *Seafarers Local 777 (Yellow Cab Co.) v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978). A "union's bad faith bargaining can effectively obliterate 'the existence of a situation in which the employer's good faith could be tested.'." *Continental Nut Co*., 195 NLRB 841, 845 (1972). Thus, "if it cannot be tested, its absence can hardly be found." *Times Publ'g Co.*, 72 NLRB 676, 683 (1947), quoted with approval more recently, *Chicago Tribune Co.*, 304 NLRB 259, 260 (1991). The Guild cannot engage in bad faith bargaining, only for the General Counsel to advance a theory that Free Press and News "refused to bargain," when there was never an obligation to bargain, in the first place.

In this regard, neither Free Press nor News had an obligation to engage in effects bargaining with the Guild as the Guild conditioned bargaining on amending the existent contracts. The Board, in *Mental Health Services, Northwest* held that the continued maintenance of a non-mandatory subject of bargaining in a proposal as a condition to reaching an agreement constitutes a refusal to bargain, under the Act. (*See* 300 NLRB at 928 citing *Borg-Warner*, at 349; *Laredo Packing Co.*, 254 NLRB 1, 18-19 (1981)).

Further, an examination of the Guild's proposals, and Free Press and News's responses, demonstrated no refusal to bargain in violation of Section 8(a)(5) of the Act. Free Press and News considered the Guild's six-part proposal.

Point #1 proposed:

> *1. There will be no charge for those employees who need to leave the building for assignments, particularly but not limited to reporters and photographers.*

This proposal represented a change to the status quo. (Tr. 688-89). This proposal sought to have some employees park for free. These employees had not previously parked for free. Free Press and News rejected this proposal.

Point #2 proposed:

> *2. Those same employees will be assigned spots in the closer parking lot.*

This proposal reflected a change to the status quo. (Tr. 689). Again, the Guild proposed that employees park for free. Free Press rejected this proposal.

Point #3 proposed:

> *3. For remaining employees, the cost will not go above the $25 they are currently paying.*

This represented a change to the status quo. All individuals – represented and unrepresented – employed by Free Press and News, had historically been offered parking on the same terms and conditions. The Guild's proposal sought to have Guild-represented employees park at a rate different from all other non-Guild-represented employees – including employees represented by other unions. Free Press rejected this proposed change to the status quo.

Point #4 proposed:

4. Those with medical conditions/disabilities should be allowed to park in the closer lot.

Free Press, prior to negotiations, had considered this issue. (Tr. 880). The Guild's June 10, 2014 information request had asked if the parking would be "ADA compliant?" (J. Ex. 4). Free Press and News agreed to permit individuals with disabilities to park at the closer Financial District lot at the cost of the First Street lot. The Guild recognized that Free Press and News changed its position on parking, as it related to employees with disabilities, due to the Guild's proposal on the issue. (Tr. 675). The first time the Guild learned of Free Press and News changing its position on parking, insofar as it pertained to employees with disabilities, was at the July 11, 2014 bargaining meeting. (Tr. 675-76). Subsequent to the negotiations, on July 14, 2014, the Guild considered the companies' change in position to be a "concession," asserting, "so the company adopted one common sense piece of fairness." (J. Ex. 35).

Point #5 proposed:

5. The company shall keep the current company cars – two for the Free Press and two for the News. These can be used for breaking news assignments should staffers choose to use them, or have to use them in the event their own vehicle is unavailable.

Free Press and News rejected the Guild's proposed modification to the existing CBAs, which already addressed vehicles[7], as neither Free Press nor News was willing to agree to a specific number of vehicles. Free Press and News did agree, however, to make certain that the existing vehicles were in good working condition. (Tr. 677).

Point #6 proposed:

[7] Without any objection from the Guild, the number of vehicles made available to the Guild was historically and unilaterally decreased. (DFP Ex. 12; Tr. 815-817).

> *6. Those who work nightshift shall be allowed to move their cars to the closer lot after 6 p.m. at no extra charge; or will be allowed to park in the closer lot at the minimal charge.*

Free Press and News rejected this proposal, explaining to the Guild that DMP did not own the new lots, so there was no way to agree to this proposal. (Tr. 682).

The Guild called an end to the July 11, 2014 bargaining session, stating they had nothing more and that they were done. (Tr. 882, 900). The Guild thereafter never sought to bargain with Free Press and News further. (Tr. 535, 591-92, 884). The Guild admitted that at no time had either Free Press or News indicated a refusal to continue bargaining about any concerns the Guild had about parking and procedures affiliated with the move to the 160 Fort Street building. (Tr. 535, 650-51, 680, 703-04, 906, 907-08).

Given the facts, describing the July 11, 2014 meeting as something other than bargaining strains credulity. Every Union representative labeled his or her notes as "bargaining notes." (Tr. 650, 695-96, 741-42, 772). Guild President Gallagher's bargaining notes further state "Bargaining resumes at 10:45" after the conclusion of the Guild's caucus. (Tr. 696, 707).

The Guild consistently referred to the July 11, 2014 meeting as a bargaining meeting. After the meeting, the Guild announced that Free Press and News had made a concession regarding parking for individuals with disabilities. (J. Ex. 36). Only after the Guild filed a charge did the Guild's description of the meeting change. The Guild's position is disingenuous; the facts and the Guild's consistent admissions reflect that the parties engaged in bargaining on July 11, 2014.

Section 8(d) of the Act explains:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the

> representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession…

29 U.S.C. § 158(d).

Free Press, at all times, honored its statutory obligation to bargain with the Guild about the effects of the decision to move from 615 West Lafayette to 160 Fort Street, and the accompanying closure of the parking lots. The theory apparently advanced by the General Counsel is that Free Press violated the Act by ***failing to agree to the Guild's proposals to engage in mid-term bargaining, and to change the status quo***. Even assuming, *arguendo*, that the Guild's proposals did not seek to change the status quo, the General Counsel's argument amounts to a refusal to bargain for ***failing to agree to the Guild's proposals***. A failure to agree to a proposal is not a violation of the Act, as expressly stated in Section 8(d).

The Guild, aided by the General Counsel, seeks to play a game of semantics[8] in claiming that the bargaining meeting of July 11, 2014 was simply a "meeting," and that no "real bargaining" occurred because the outcome of the meeting was apparently not to the satisfaction of the Guild. Subjective analyses of bargaining sessions cannot be the

[8] In this regard, Union Treasurer and News unit chair Kim Storeygard should not be deemed a credible witness. She testified, in response to a question inquiring if she was coached to testify that the Guild had a "meeting," as opposed to a "bargaining meeting" on July 11, 2014, "I was encouraged to recognize the distinction between meeting and bargaining" by counsel to the Guild. (Tr. 740). Storeygard also claimed ignorance on what the word "concession" meant, generally (Tr. 774), and specifically, when confronted with the Guild's July 4, 2014 communication to bargaining unit employees (J. Ex. 35; Tr. 775-76). Storeygard's testimony was all the more unbelievable as Storeygard – who also doubles as a "writing coach and reading tutor for children with disabilities" – is a graduate of Northwestern University who majored in English. (Tr. 720, 774).

basis for objectively analyzing a violation of the Act. Essentially, the General Counsel asserts an argument amounting to "the Guild says there was no bargaining because there was no agreement, *ergo* Free Press and News refused to bargain." Such an argument is outrageous and should be summarily dismissed.

An objective evaluation of facts demonstrates that Free Press and the Guild bargained on July 11, 2014, to wit:

- On June 10, 2014, the Guild proffered an "information request concerning parking," where the Guild stated that it had "the right to bargain the effects of the move, which would include any change in parking arrangements or costs." (J. Ex. 4).
- On June 16, 2014, the Guild, in writing, stated, *inter alia*, "I am hereby requesting bargaining concerning the parking policy issued to our members today." (J. Ex. 8; GC Ex. 29). The subject line of the E-Mail was "Request for Bargaining." (GC Ex. 29).
- Free Press and the Guild coordinated to schedule mutually agreeable dates and a location for bargaining. (J. Exs. 9-13, 15-20).
- On June 20, 2014, Guild Administrative Officer Grieco, in reference to scheduling a meeting date, said that he needed "to check with my bargaining folks." (J. Ex. 12).
- On June 27, 2014, Guild Administrative Officer Grieco wrote, "In anticipation of our upcoming effects bargaining, I will need answers to the following…" (J. Ex. 20).

- On June 30, 2014, Guild Administrative Officer Grieco stated, in response to the announced July 7, 2014 deadline to sign up for optional parking, "Given the fact that the bargaining we requested on June 10 will not begin until July 11, we request that the July 7 deadline be postponed. This will give us the opportunity to bargain the issues and perhaps resolve any issues that might affect the employees' decisions. … We are concerned that bargaining after the policy is decided and announced to employees will not be meaningful…" (J. Ex. 22).
- On July 1, 2014, Lefebvre sent an E-Mail to Grieco explaining, in relevant part:

  > As you know, this [parking] policy effects [*sic*] all employee, [*sic*] not just the bargaining unit. That being said, we do recognize your request to postpone the July 7 deadline until such time as we are able to meet. We will be sending out a communication shortly addressing a number of questions that have been asked, and included in these will be the extended deadline date.
  >
  > I will forward to you as soon as it is sent. (J. Ex. 25).

- On July 11, 2014, the Guild styled the document as "Guild Proposal for Parking." (J. Ex. 34).
- In the Guild's July 11, 2014 proposal, the preamble stated, "This proposal would amend the current contracts and be in force until new contracts are bargained." (J. Ex. 34).[9]

[9] Based on the face of this proposal, the Guild attempted to engage in mid-term bargaining of the existent CBAs – not effects bargaining regarding parking policies and procedures. As previously explained, Section 8(d) proscribes mid-term bargaining on permissive, non-mandatory subjects of bargaining. *See Borg-Warner, supra; also see Smurfit-Stone Container, supra.*

- The July 11, 2014 meeting occurred in the production conference room where the Guild, Free Press, and News had met, historically, on issues for bargaining. (Tr. 668-69).
- Union President and Free Press unit Chair John Gallagher testified that he understood that Mr. Behan was the chief bargainer on behalf of the Free Press. (Tr. 669).
- Gallagher testified that he recognized attorney Robert Vercruysse as representing News at the July 11, 2014 meeting. (*Id*.)
- Gallagher testified that the first time Free Press took a position with respect to employees with disabilities being able to park in the more expensive parking lot at the less expensive parking lot rate was on July 11, 2014, in response to the Guild's proposal. (Tr. 674-76).
- Gallagher testified that Free Press and News responded to each of the Union's six points in its July 11, 2014 proposal. (Tr. 681-83).
- Gallagher testified that Free Press and News asked the Guild if it had a different proposal after having rejected five of the six items in the Guild's July 11, 2014 proposal for the reasons explained at the table. (Tr. 683-84).
- Gallagher testified that the Guild made no further proposals, stating, "… that is all we have for today." (Tr. 684). Gallagher further testified that Behan, at the July 11, 2014 meeting stated words to the effect of "this was a new environment that we were working in and it could be changing and that the parties ought to keep in touch with each other." (Tr. 685).

- Gallagher testified that the Guild's proposals sought to change the status quo so that some employees would no longer have to pay for parking, recognizing it as "an improvement over prior conditions." (Tr. 688-89).
- Gallagher testified that in his experience negotiating with Behan, Behan had, in the past, said no to a proposal, "but that didn't mean that that was the end of bargaining." (Tr. 690).
- Gallagher styled the notes taken at the July 11, 2014 meeting as "Bargaining Notes: Parking." (Tr. 694-95).
- In his notes, Gallagher wrote, "Bargaining resumes at 10:45." (Tr. 696).
- News Unit Chair and Guild Treasurer Kim Storeygard entitled her notes from the July 11, 2014 meeting "7/10/14 Parking Bargaining." (Tr. 742).[10]
- Storeygard testified that she had attended previous bargaining sessions and that the company does not always agree with what the Union has proposed and that in her experience, in bargaining, when a proposal is continuously pressed, the initially rejecting party occasionally changes its mind. (Tr. 742).
- Storeygard testified that in her experience, it was not unusual to have an attorney represent the News and Free Press when bargaining was going to occur. (Tr. 743).
- Storeygard testified that she was "encouraged to recognize the distinction between meeting and bargaining" by Guild counsel Ice before she testified (Tr. 740), and that she was to "be careful and use the word 'meeting,' don't use the word 'bargaining'," and that she was "reminded that all meetings are not bargaining." (Tr. 747-48).

[10] Storeygard testified that she "might have gotten the date wrong," which she did. (Tr. 742).

- Storeygard testified that Item #1 of the Guild's July 11, 2014 proposal represented an improvement to News employees, and a change from the status quo. (Tr. 751).
- Storeygard testified that the second item of the Guild's July 11, 2014 proposal represented a proposal to improve the position of News reporters, compared to the old parking situation. (Tr. 751-52).
- Storeygard testified that in response to the Guild's concerns about protecting photographers and their equipment, News indicated that it was not done thinking about the issue. (Tr. 757).
- Storeygard testified that Free Press and News responded to each item on the Guild's July 11, 2014 proposal. (Tr. 760-62).
- Storeygard admitted that in her experience in bargaining, when negotiators sometimes state or take a position contrary to a proposal, the initially rejecting party might change their mind if the initially proposing party continues to bargain. (Tr. 764).
- Storeygard testified that after the Guild's caucus on July 11, 2014, the Guild offered no new positions or proposals. (Tr. 764).
- Storeygard acknowledged that no one from the company said, "We are not involved in bargaining at all." (Tr. 764).
- Storeygard testified that Vercruysse, on behalf of News, pointed out that the CBA with News did not require that parking be one of the benefits the company maintains for the life of the CBA. (Tr. 765).

- Storeygard admitted that she negotiated the 2013 News CBA (J. Ex. 2), and that only the benefits listed on Page 23 were those the Guild had negotiated would be maintained for the life of the agreement. (Tr. 765-67).
- Storeygard testified that after the meeting on July 11, 2014, the Guild never requested another bargaining meeting with the company. (Tr. 769).
- Storeygard testified that the only time she interfaced with Behan in her capacity as a Union representative was for bargaining purposes. (Tr. 773).
- Storeygard testified that the Guild bargaining committee made the choice not to deviate from the terms of its proposal, in response to the company's rejection of certain aspects of it. (Tr. 776).
- Storeygard testified that Behan, in response to concerns about security and escorts, stated that Free Press would be willing to evaluate escorts and security in the future, and that the Guild never contacted Free Press to discuss escorts and security after the July 11, 2014 meeting. (Tr. 776-77).

These facts constitute admissions, by the Guild, that the parties engaged in bargaining. The allegations asserting a refusal to bargain should be dismissed.

III. PAST PRACTICE REFLECTS HISTORICAL, UNILATERAL CHANGES IN PARKING LOCATIONS AND COSTS WITHOUT BARGAINING.

DMP, as agent of Free Press and News, had a rich, demonstrated, history of unilateral changes to parking policies and procedures. The changes complained of in the instant dispute were consistent with DMP's past practice of unilaterally changing parking policies and procedures. Historically, DMP, as agent of Free Press and News, had unilaterally changed both the location of parking and the charges for parking of Free Press and News employees – Guild-represented or otherwise – without bargaining. The

status quo, based upon past practice, is that Guild-represented employees of Free Press are able to opt-into parking offered by DMP on the same basis as non-Guild-represented employees. DMP, as agent of Free Press and News, maintained this status quo upon moving to the 160 Fort Street location.

DMP has historically, unilaterally, implemented parking policies and procedures; the Guild has never demanded bargaining about the costs of parking, or the effects of DMP's decisions regarding parking policies and procedures. The Guild, in filing these charges, seeks to alter the status quo.

In *Courier Journal ("Courier-Journal I")*, 342 NLRB 1093, 1095 (2004), the Board found no violation of Section 8(a)(5) of the Act because the changes to employees' health insurance premiums were made for both unit and non-unit employees consistent with prior changes made both during the parties' successive contracts. The Board determined that changes even made during the hiatus periods between contracts did not violated the Act because the changes were grounded in past practice rather than contractual sanction. *Id*.

"A unilateral change made pursuant to a long-standing past practice is essentially a continuation of the status quo – not a violation of Section 8(a)(5)." *Courier-Journal I* at 1094 (citing *NLRB v. Katz*, 369 U.S. 736, 746, 82 S.Ct 1107, 8 L.Ed.2d 230 (1962)). A change to the status quo can be achieved through bargaining; unless the status quo is somehow changed through bargaining, both a union and an employer are bound to maintain the status quo. DMP, as agent of Free Press and News, maintained the status quo regarding parking policies and procedures upon the move to the 160 Fort Street

location – the option of parking was maintained on the same basis for Guild-represented employees and all other Free Press and News employees.

DMP, as agent of Free Press and News, had a past practice of modifying parking policies and procedures for both Guild-represented employee and all other employees. In *Courier-Journal I*, the company acted pursuant to both the expired CBA and past practice when it modified health insurance coverage over the objection of the union. The changes were made on the same basis for both represented and unrepresented employees. *See* 342 NLRB at 1093. The Board dismissed the complaint and explained, "A unilateral change made pursuant to a long-standing practice is essentially a continuation of the status quo – not a violation of Section 8(a)(5). *Id* at 1094 (citing *NLRB v. Katz*, 369 U.S. 736, 746, 82 S. Ct. 1107, 8 L. Ed. 2d. (1962)). In explaining its analysis, the Board recognized that the change was "grounded in past practice and the continuance thereof," thus the unilateral change – which occurred after the expiration of the CBA – did not violate the Act. *Id* at 1095. In *Courier-Journal I*, there was a practice "for some 10 years" of the company making unilateral changes to health insurance without union opposition. *Id* at 1094. And the Board recognized that the company's discretion to make changes was limited by making changes on an equal basis as non-represented employees and "even if the discretion is not limited, the past practice, accepted by the Union, privileged Respondent's actions in 2002." *Id*. Significantly the Board passed on a waiver analysis, instead explaining, "Our decision is not grounded in waiver. It is grounded in past practice, and the continuance thereof." *Id* at 1095.

In the instant case, it is undisputed that DMP, as agent of Free Press and News, made changes to parking policies and procedures on the same basis for Guild-represented

employees as non-Guild-represented employees. Similarly, it is undisputed that since at least 1971, Free Press has made unilateral changes to parking policies and procedures, including the unilaterally closing parking lots, unilaterally changing rates, unilaterally changing from daily parking fees to a payroll deduction, and unilaterally determining at which parking lots Free Press and News would provide employees the option of parking. (Tr. 321-22). This evidence of past practice compels dismissing the allegations of the case.

In *Courier-Journal* ("*Courier-Journal II"*), 342 NLRB 1148 (2004), a companion case to *Courier-Journal I*, the Board relied on *Courier-Journal I* and concluded that the company was entitled to make unilateral changes during the hiatus period between two contracts due to the historical past practice of the company making unilateral changes. *See* 342 NLRB 1148; *See also The Post-Tribune Co.*, 337 NLRB 1279, 1279 (2002)(and cases cited therein). The Board accorded great deference to the fact that the company made changes on the same basis for bargaining unit employees and non-bargaining unit employees in its decision to dismiss the complaint. *Id*. This fact reflected and was evidence of past practice, compelling the dismissal of the complaint. The Board further recognized that a waiver analysis is distinct from a past practice argument; *Courier-Journal I* and *II* expressly rejected applying a waiver analysis to a past practice argument. *See* 342 NLRB at 1095; 342 NLRB at 1148, respectively.

A. THE STATUS QUO AT FREE PRESS WAS DYNAMIC AND SUSCEPTIBLE TO CHANGE BASED ON PAST PRACTICE

A status quo is considered "dynamic" when it is susceptible to change based on the existing relationship of the parties. In *Ventura County Star Free Press*, 279 NLRB

412 (1986), the Board adopted a dynamic status quo analysis in considering whether an employer had discontinued step wage increases after expiration of the CBA:

> I turn now to consideration of the central issue herein – did Respondent violate Section 8(a)(1) and (5) of the Act by failing and refusing to pay step increases to employees, who reached new experience levels on or before March 1, 1983, without first giving notice to and bargaining with Local 784.
>
> ***
>
> Inasmuch as this practice was memorialized in the 1980 to 1982 collective-bargaining agreement, the applicable Board law is as follows: 'The Board has held that an employer's duty to bargain over changes in established terms and conditions of employment is not relieved by the expiration of a collective-bargaining agreement. Although the expiration of a contract may permit an employer to negotiate new and different terms, it may not, absent an impasse or waiver by the union, unilaterally change established practices with respect to mandatory subjects of bargaining.' … In other words, an employer has a duty to maintain in effect the terms of an expired collective-bargaining agreement and continue the "dynamic status quo."

Id. at 420 (internal citations omitted). In the instant case, there was no expired CBA, and also of note, neither of the collective bargaining agreements has any provision whatsoever concerning parking locations or parking costs. Any parking benefit enjoyed by the Guild-represented employees was entirely a creature of past-practice. Assuming *arguendo* that parking policies and procedures are a mandatory subject of bargaining, the principle remains the same: the status quo at Free Press and News, with respect to parking policies and procedures, was dynamic.

In *Matheson Fast Freight, Inc*., 297 NLRB 63 (1989), the Board recognized a dynamic status quo and found no violation of the Act when an employer changed starting times after a union won an initial election. The Board stated, "… continuation of this past practice of making 'dynamic' economically-motivated changes in start times does

not constitute an unlawful changes [sic] in terms and conditions in employment," *Id.* at 67 (citing Robert A. Gorman, *Basic Text on Labor Law of Unionization and Collective Bargaining*, West Publishing Co. (1977), page 400), for the proposition that:

> A so-called unilateral change in wages and working conditions is also usually condemned as per se illegal, although it is clear that such action is lawful when, for example, it is consistent with a 'dynamic' status quo, or is authorized by a collective bargaining agreement, or within a limited range of circumstances is required by statute).

In *Eastern Maine Med. Ctr. v. NLRB*, 658 F.2d 1, 21 (1st Cir. 1981), the court recognized that the dynamic status quo was correctly considered by the Board to find that an employer violated the Act by denying a wage increase to newly organized employees while providing a wage increase to unrepresented employees. The Court of Appeals enforced the Board's order, stating in pertinent part: "During negotiations, the employer's obligation under *Katz* is to maintain the dynamic status quo…."; *See also, Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1084-1085 (1st Cir. 1981), ("preserve the 'dynamic status quo,' consistently with past policies and practices" as one of several circumstances when unilateral employer action does not violate the Act.).

Waiver should not be confused with past practice. Waiver and past practice are analytically distinct concepts. *See Larry Gweke Ford*, 344 NLRB 628, fn 1 (2005)("prior acquiescence of the charging party union is not invariably a requisite element in the past practice analysis …")(as cited in *E.I. DuPont De Nemours*, 355 NLRB 1084 (2010)(member Hayes in dissent), *petition for rev. granted, E.I. Du Pont De Nemours and Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012)); also see *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992)("waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (***including***

past practices), bargaining history, and action or inaction, or by a combination of the two." (Quoting *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2nd Cir. 1982)(emphasis added); *Kiro, Inc.*, 317 NLRB 1325, 1328 (1995)).

The unrebutted record evidence is that Free Press has unilaterally modified parking policies and procedures since at least 1971, without bargaining. News has engaged in similar changes, historically. Free Press has unilaterally changed the costs, locations, and procedures relating to parking, without bargaining. The Guild has never sought to bargain over anything beyond parking lot security concerns, but even that bargaining demand was abandoned. An unachieved bargaining demand is evidence of waiver.

B. THE GUILD WAIVED ANY BARGAINING RIGHTS IT HAD REGARDING PARKING

Free Press and News agreed to meet with the Guild at a mutually agreeable time and place. The negotiations were delayed because of the Guild President John Gallagher's unavailability due to vacation. (Tr. 479-80). Free Press and News endeavored to meet with the Guild to discuss parking. The record reflects that the entire bargaining meeting lasted less than an hour, with a ten-minute caucus called by the Guild. (Tr. 506, 640). The record further reflects that the Guild called an end to negotiations, stating that they were "done," and that they "had nothing further." (Tr. 882, 900). The parties reconvened after the caucus only at the insistence of Free Press and News. (Tr. 882). At no point after the Guild's caucus did the Guild offer the companies a proposal different from what the Guild initially proposed. (Tr. 506, 649, 684, 729, 759, 763).

Every witness who testified stated that both Free Press and News never refused to bargain further about the parking concerns raised by the Guild. (Tr. 535, 650-51, 906). It

was the Guild who failed to seize upon its opportunity to bargain. The Guild elected to meet for less than an hour, total. Prior to meeting, the Guild made various information requests with which Free Press and News complied. (Tr. 473-76, 486) Subsequent to the July 11, 2014 meeting, the Guild never pursued bargaining any farther. (Tr. 535, 591-92, 884). Instead of attempting to continue to bargain about the effects of the decision, the Guild filed an unfair labor practice charge with the Region.

The Guild's actions amount to a waiver of its right to bargain. *American Diamond Tool, Inc.*, 306 at 570, recognized that effective waivers must be "clear and unmistakable." (*citing Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983)). However, *American Diamond Tool* further explained, "Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties, (including past practices, bargaining history, and action or inaction), or by a combination of the two." *Id*. (quoting *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2nd Cir. 1982)). *In American Diamond Tool*, the union had notice of the company's unilateral layoffs after they occurred; the union had an opportunity to object to the layoffs, the company engaged in good-faith bargaining and there is no evidence that the company would not have bargained about the layoffs, and the union failed to take advantage of its opportunity to bargain about the unilateral layoffs. *Id* at 570-71. The union's conduct amounted to a waiver. *Id* at 571 (noting *Associated Milk Producers*, 300 NLRB 561 (1990); *Ventura County Star-Free Press*, 279 NLRB 412, 420 (1986); *Continental Tel. Co.*, 274 NLRB 1452, 1453 (1985).

As explained in *Boeing Co.* 337 NLRB at 763:

> A Union has an obligation to seize the bargaining opportunity afforded by advance notice of a proposed employment condition change or risk waiver

> of its statutory right. *Jim Walter Resources*, 289 NLRB 1441 (1988). A union does not preserve its statutory bargaining right by declining to meet and negotiate while seeking to assert a bargaining right by protesting an employer's conduct or by filing an unfair labor practice charge, as the Union did here. *See Bell Atlantic*, 332 NLRB 1592, 1598 (2000); *American Diamond Tool*, 306 NLRB 570 (1992); *Associated Milk Producers*, 300 NLRB 561 (1990); *Citizens Bank of Willmar*, 245 NLRB 389 (1979). There is no evidence that Respondent's conduct relieved the Union of its obligation to pursue the bargaining opportunities repeatedly offered by Respondent. While the union may have thought Respondent's mind was made up and that further bargaining was futile because Respondent seemed set on applying the SCPEA plans, it is not unlawful for an employer to present its position as a fully developed plan. Even informing a union that its position would not change does not relieve a union from its responsibility to request bargaining. *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998); *Haddon Craftsmen*, 300 NLRB 789 (1990). Moreover, there is no evidence that Respondent might not have been amenable to alterations in the SCPEA plans. The Union's conduct suggests that its sole objective was to obtain the Total Compensation and Benefit Plan for the affected employees and that it had no real intent to negotiate any other plan. Its adamant insistence that matters be worked out through a "third party" or the Board creates a strong inference that the Union wanted to obtain through Board processes what it had no power or ability to obtain through traditional bargaining. Such constitutes a waiver of any statutory bargaining rights that might have existed in this situation.

The parallels of this case and *Boeing*, as well as *American Diamond Tool*, are clear. The Guild admitted that it did not seize upon its opportunity to bargain. Grieco testified that until the Guild proposed changing the parking policy with respect to individuals with a disability, the Guild did not know if Free Press and News would accede to the Guild's position. (Tr. 591). The transcript reflects:

> Q: Because if you hadn't have raised it, the company wouldn't have had the common sense to change its policy with respect to individuals with a disability from your perspective, right?
>
> A: Perhaps.
>
> Q: But you didn't know until you asked, right?
>
> A: That's true.

****

Q By Mr. Plosa: And it's accurate to say from your perspective that you didn't try again with respect to seeing if the company would change its policy with respect to parking, did you?

A: That's true.

****

Q: It's accurate to say that after the July 11 meeting, you never contacted anyone trying to meet again for – to talk about parking, correct?

A: That's correct.

Q: Don't even have to categorize it as bargaining demands, but you never even said, hey, let's talk about this? You?

A: I never did.

(Tr. 591-92). Colloquially speaking, Grieco acknowledged the maxim, "You don't know if you don't try." The Guild failed to avail itself of bargaining; neither Free Press nor News can be found to have refused that which was not requested.

Far from the General Counsel's allegations that Free Press and News refused to bargain with the Guild, the Guild, through its actions and inactions, failed to take advantage of any right it had to bargain about parking. The Guild's conduct, in this case, amounted to a waiver. Where the Guild has failed to take advantage of its opportunity to bargain, Free Press and News cannot be found to have refused to bargain. This allegation should be dismissed.

IV. ALLEGATIONS OF DIRECT DEALING SHOULD BE DISMISSED

A. THE JUNE 16, 2014 E-MAIL

The General Counsel alleged that a June 16, 2014 E-Mail sent by DMP constituted direct dealing in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (J. Ex.

6). The communication was sent to all individuals at DMP, all individuals at Free Press, and all individuals at News. (Tr. 658-59, 772).

Encompassed in the E-Mail distribution lists reflected in the June 16, 2014 E-Mail were Guild President and Free Press Unit Chair John Gallagher (Tr. 659), as well as Guild Treasurer and News Unit Chair Kim Storeygard (Tr. 772-73). Gallagher testified that approximately two to three months in advance of the E-mail he "brought [up parking after the move to 160 Fort Street] with Joyce Jenereaux and Paul Anger while talking to them about other subjects and would say, by the way, we're all concerned about the parking rates and what's going to happen when we move into the new building." (Tr. 659-60). In response Jenereaux told Gallagher, "It's being studied, and there'll be a plan produced at the appropriate time." (Tr. 660). The June 16, 2014 E-Mail was the response.

It is undisputed that Gallagher and Storeygard received the E-Mail when it was sent. Further, additional Guild representatives at Free Press, as well as News, received the E-Mail contemporaneous with its sending. (Tr. 706). At the hearing, on the record, Guild Administrative Assistant Grieco asserted that Free Press and News engaged in "direct dealing," "because the company had sent out information to employees about parking before sending it to [me]." (Tr. 586).

An employer violates Section 8(a)(5) of the Act by failing to bargain collectively with an employer's representative. Section 8(a)(5) incorporates, by reference, Section 9(a) of the Act, which makes the employees' representative the exclusive bargaining agent of employees. *See Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 661 (6th Cir. 2005). As a result, "employers may not go directly to employees, who have not repudiated their union, and bargain with them on matters covered by the collective

bargaining agreement." *Id*. (citing *NLRB v. Goodyear Aerospace Corp.*, 497 F.2d 747, 752 (6th Cir. 1974); *see also NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967) ("Only the union may contract the employees' terms and conditions of employment"). Section 9(a) of the Act creates a duty for an employer to bargain with the exclusive representative of employees, and creates a "negative duty to treat with no other." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84, 64 S.Ct. 830, 88 L.Ed. 1007 (1944). In *Medo Photo Supply Corp.*, the company directly negotiated with its employees, offering them a wage increase in exchange for the employees repudiating and abandoning the union. *See* 321 U.S. at 685, 64 S.Ct. 830, 88 L.Ed. 1007. The Court explained, "…it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a majority [*sic*], with respect to wages, hours, and working conditions …" *Id* at 684 (citing *J.I. Case Co. v. Labor Board*, 321 U.S. 332, 64 S.Ct. 576 (1944).) The instant case is a far cry from *Medo Photo Supply*.

In balance, however, the Act embodies an employer's First Amendment rights to speak freely without government interference "about a wide range of issues including the status of negotiations, outstanding offers, its position, the reasons for its position, and objectively supportable reasonable beliefs concerning future events." *American Pine Lodge Nursing and Rehabilitation Center v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999) (citing *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969); *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 516 (4th Cir. 1998); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 969 (10th Cir. 1990); *NLRB v. Pratt & Whitney*,

789 F.2d 121, 134 (2nd Cir. 1986). An employer "may freely communicate with employees in non-coercive terms, as long as those communications do not contain some sort of expressed or implied *quid pro quo* offer that is not before the union. *See, e.g. Selkirk Metalbestos, N.A. v. NLRB*, 116 F.3d 782, 788 (5th Cir. 1997) (noting that the promise of benefit need only be reasonably inferable from the conduct); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 943 (3rd Cir. 1980)." *American Pine Lodge* at 875. Section 8(c) has been recognized as the codification of the First Amendment, in the Act. *See Gissel Packing Co.*, 395 U.S. at 618, 89 S.Ct. 1918, 23 L.Ed.2d 547.

Pratt & Whitney identified two ways in which to distinguish direct dealing:

1) The employer's communications themselves can provide a basis for finding an unfair labor practice; additionally
2) The challenged communications can be viewed within a pattern of other unfair labor practices which, when examined in its totality, revealed direct dealing and violation of § 8(a)(5).

See 789 F.2d at 134-35. In the instant case, there is no "pattern of other unfair labor practices" for the General Counsel to cite, nor has the General Counsel alleged any pattern. Instead, the General Counsel appears to rely on the idea that the June 16, 2014 communication, itself, is direct dealing.

Neither Free Press nor News engaged bargaining unit employees in order to circumvent the Guild's representation of the employees. Guild President Gallagher had approached Joyce Jenereaux and Paul Anger approximately two to three months before the June 16, 2014 E-Mail inquiring about the subject; Jenereaux told Gallagher the matter

was being studied and a communication would be forthcoming. (Tr. 659-60). There is no evidence that Gallagher so much as suggested Jenereaux send the notification to Grieco.

Nothing in the June 16, 2014 E-Mail could be construed as a *quid pro quo* for abandoning the Guild, assuming, *arguendo*, there was an obligation to bargain about parking. The General Counsel has championed the idea that merely communicating with employees – both represented and non-represented employees – constitutes direct dealing in violation of the Act. The General Counsel's theory begs the questions: 1) What was the proposal?; 2) What was the *quid pro quo*?; and, 3) What was the inducement to abandon the Guild?; particularly when the E-Mail responded to Gallagher's inquiries. As the General Counsel has the burden of proof, it is imperative that these questions are answered. In the absence of answering these questions, no unfair labor allegation should be sustained.

Guild Administrative Officer Grieco testified that he reports to Guild President John Gallagher. (Tr. 691-692). It is undisputed that Gallagher (as well as other Guild representatives) received the June 16, 2014 E-Mail upon its sending. (Tr. 706). It is similarly undisputed that Free Press and News forwarded the communication to Grieco. Grieco testified that, as a new administrative officer, he was unaware of the practice in which Free Press and News communicated announcements to the Guild. (Tr. 586-87). The General Counsel offered no evidence to prove that sending a communication to the Guild President (as well as other Guild representatives) and not exclusively to Grieco, was a "bypassing" of the Guild. It strains credulity to assert that sending a communication to Grieco's superiors in the Guild can be construed as a bypassing of the Guild, particularly when the communication responded to Gallagher's inquiries.

Further, the Board imparts knowledge by shop stewards as sufficient notice to a union for purposes of alleging a violation of the Act. *See Don Zarsky-Goldberg Memorial Chapels, Inc.*, 264 NLRB 840 (1982) (Union deemed to have firsthand knowledge of surveillance via a hidden microphone when certain pro-union employees learned of the microphone.) *See also, Vemco Inc. v. NLRB*, 79 F.3d 526, 151 L.R.R.M. 2811 (6th Cir. 1996) (Section 10(b) period began to run on date employee, who was a union supporter but not a union officer, received notice via disciplinary action of the employer's change in a no distribution policy). In *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1260 (6th Cir. 1995), the Court explained:

> While "formal and full" notice may be prudent, if only to preclude another from claiming ignorance, it is not required…. "Where a union had actual notice of an employer's intentions at a time when there was sufficient opportunity to bargain prior to implementation of the change, the employer may not be faulted for failing to afford formal notification."
>
> In our case, the Hospital notified its employees, in writing on two occasions, that its practice of supplying laundered scrubs was being terminated. The registered nurses, therefore, including those on the Union Executive Committee, were informed that scrubs would no longer be provided. Consequently, we conclude that, although the Union did not receive formal notice of the change in scrub policy, it nevertheless received actual notice sufficient to satisfy the Hospital's duty to notify.

Id. at 1260. (internal citations omitted.); *also see* the decision of ALJ William G. Kocol in *Providence Journal Co*., 2002 NLRB Lexis 418 (Sept. 12, 2002), wherein he found that the union was on constructive notice of a change in a particular premium payment because the change was readily apparent from employee pay stubs.). Neither Free Press nor News engaged in direct dealing by sending the June 16, 2014 E-Mail. This allegation should be dismissed.

B. THE JULY 2, 2014 E-MAIL

The General Counsel alleged that a July 2, 2014 E-Mail sent by DMP constituted direct dealing in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (J. Ex. 26). A simple examination of the facts does not support this claim.

On June 30, 2014, via E-Mail, Grieco requested that the July 7 deadline announced in Ms. Jenereaux's June 16, 2014 E-Mail regarding the selection of parking be postponed to:

> … give us the opportunity to bargain the issues and perhaps resolve any issues that might affect the employees' decisions. If you will not at least postpone the deadline, we request that the policy and procedure announced in Ms. Jenereaux's E-Mail be rescinded and the status quo be restored. We are concerned that bargaining after policy is decided and announced to employees will not be meaningful, and the Company will simply go through the motions but make no agreements, precisely because the policy has already been unilaterally determined and announced.

(J. Ex. 22).

On June 30, 2014, Lefebvre, in an E-Mail to Grieco, stated that he would "work on getting the answers to your questions below," in response to Grieco's June 27, 2014 E-Mail questions. Lefebvre's same June 30, 2014 E-Mail asked Grieco to confirm his availability for July 11, 2014 at 10:00 a.m. (J. Ex. 23).

Later that day, Grieco confirmed, "We will be there on July 11 at 10 a.m." (J. Ex. 24).

On July 1, 2014, Lefebvre sent an E-Mail to Grieco explaining, in relevant part:

> As you know, this [parking] policy effects [*sic*] all employee, [*sic*] not just the bargaining unit. That being said, we do recognize your request to postpone the July 7 deadline until such time as we are able to meet. We will be sending out a communication shortly addressing a number of questions that have been asked, and included in these will be the extended deadline date.
>
> I will forward to you as soon as it is sent.

(J. Ex. 25).

On July 2, 2014, Joyce Jenereaux, via E-Mail to all DMP employees, all Free Press employees, and all News employees, sent an "FAQ" regarding questions about the new building and the move, including parking. (J. Ex. 26). Included was a postponement of the deadline to sign up for parking, postponing the date to July 21, 2014. (*Id*.)

Eleven minutes later, on July 2, 2014, Lefebvre forwarded to Grieco Ms. Jenereaux's E-Mail, consistent with his July 1, 2014 E-Mail representation. (J. Ex. 28).

The relevant chronology is, therefore:

1. On June 30, 2014, Grieco requested that the July 7 sign-up deadline be postponed (J. Ex. 22);
2. On July 1, Lefebvre responded to the request stating:

> … ***we do recognize your request to postpone the July 7 deadline*** until such time as we are able to meet. We will be sending out a communication shortly addressing a number of questions that have been asked, and ***included in these will be the extended deadline date.***

(J. Ex. 25)(emphasis added).

3. On July 2, 2014, DMP, as agent for Free Press and News, sent the communication Lefebvre referenced in his July 1, 2014 E-mail to Grieco, and informed all employees of the postponement of the deadline to sign up for parking. (J. Ex. 26).
4. Eleven minutes later, consistent with his E-mail representation of the previous day, Lefebvre forwarded the communication to Grieco. (J. Ex. 28).

The chronology of events does not support the allegations of direct dealing. One day in advance of sending out a communication postponing the signup date, DMP, as agent of Free Press and News, agreed to the Guild's request to postpone the signup date, informed the Guild that it would be sending a communication shortly, and made good on the promise to send the communication to Grieco. As previously explained, the Guild also received the July 2, 2014 E-Mail when it was sent to John Gallagher, Kim Storeygard, and other union representatives at the company. There cannot be a valid allegation of direct dealing, given these facts. This allegation should be dismissed.

V. REMEDY

DMP and Free Press join in the argument asserted by News regarding an appropriate remedy in this case. For the reasons articulated by News, the only appropriate remedy that can be fashioned, assuming a violation of the Act, is an order to bargain over the changes.

CONCLUSION

WHEREFORE, for the reasons explained herein, and for any additional reasons deemed appropriate by Your Honor, DMP and Free Press respectfully request that NLRB Case Nos. 7-CA-132726 and 7-CA-132729 be dismissed.

DATED: April 8, 2015
Nashville, Tennessee

Respectfully submitted,

/s/ L. Michael Zinser
L. Michael Zinser

/s/ Glenn E. Plosa
Glenn E. Plosa

THE ZINSER LAW FIRM, P.C.
414 Union St., Suite 1200
Nashville, Tennessee 37219
Telephone: 615.244.9700
Facsimile: 615.244.9734

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that this **POST-HEARING BRIEF** in NLRB Case Nos. 7-CA-132726 and 7-CA-132729 was filed electronically with the NLRB Division of Judges, and served via Federal Express, upon the following, this 8th day of April, 2015:

Ingrid L. Kock, Counsel for the General Counsel
National Labor Relations Board
Region 7
477 Michigan Avenue, Room 300
Detroit, Michigan 48226-2543

Duane F. Ice, Esq.
(Attorney for Local 34022)
Law Office of Duane F. Ice, P.C.
26611 Woodward Avenue
Huntington Wood, MI 48070-1332

Robert M. Vercruysse, Esq.
(Attorney for *The Detroit News*)
Vercruysse Murray, PC
31780 Telegraph Road, Suite 200
Bingham Farms, MI 48025-3469

/s/ Glenn E. Plosa
Glenn E. Plosa